PEMBINAAN KSY SDN. BHD.

v.

LIAN SENG PROPERTIES SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24-899-1990]
10 MAY 1991

COMPANY LAW: *Prohibiting order against land owned by company - Winding up - Dissipation of assets from date of winding-up order - Null and void - Purpose - Preservation of assets of company - Liquidator to recover assets disposed of - Companies Act 1985, ss. 219(2), 223, 224, 298 - National Land Code 1965, ss. 336, 417, 420.*

LAND LAW: *Judgment obtained by plaintiff against defendant - Non-payment - Prohibitory orders against defendant's property - Rights of purchaser of property - Sale approved by Court - Purchaser registered as owners of land - Whether acquired any legal or equitable right - Whether transfer null and void - Winding-up order - Companies Act 1965, ss. 219(2), 224, 298 - National Land Code 1965, ss. 336, 417, 420*

The plaintiff was appointed by the 1st defendant, D1, to construct and complete the KL Plaza. In the course of construction D1 failed to pay the plaintiff progressive payments as certified by the consulting architect of the project as a result of which the plaintiff obtained judgment in default against D1. Although D1 obtained a bridging loan from a consortium of banks, as D1 had failed to comply with the terms of the loan agreement the consortium banks refused to release the loan sum.

Pursuant to negotiations between the plaintiff, D1 and the banks, an agreement was executed by which the plaintiff agreed to complete the said project provided *inter alia* that D1 would pay the plaintiff the cost of completing the said property inclusive of the judgment sum first obtained against the defendants within 18 months from the date of completion of the said project. By another agreement called the Sharing Formula Agreement, the parties agreed *inter alia* as to the method of payments which were to be made to the plaintiff.

The defendants again failed to pay the outstanding sum to the plaintiff and once again the plaintiff obtained final judgment for that sum less the earlier judgment sum.

The plaintiff on 26 October 1989 obtained 2 prohibiting orders against the lands on which the plaza was to be built pursuant to s. 335 of the National Land Code 1965 (NLC). The plaintiff also obtained 2 writs of seizure and sale and on 26 October 1989 the plaintiff presented a petition for the winding-up against D1, agreeing that if injunctive orders were not granted, D1 or D2 might dispose of the lands on which the plaza was to be built. The Court granted the interlocutory injunctions asked for.

The said order was later amended to state that the registration effected under s. 417 and/or s. 420 of the NLC shall be without prejudice and subject to any encumbrances entered into the Register.

By an agreement dated 5 June 1989, D1 had agreed to sell the said land to D2 and that the Court had given its approval of the sale pursuant to s. 223 of the Companies Act 1965 (the Act). D2 duly paid the full purchase price to D1 to enable it to discharge all the debts owing to the banks and other chargees. D2 were duly registered as owners of the lands concerned.

On 28 June 1990 the plaintiff filed the present originating summons against D1 and D2:

(a) for a declaration that all transfers from D1 to D2 defendant be declared null and void as it was in contravention of s. 336 of the NLC;

(b) that the Registrar of Titles cancel in the Register, the registration of the said land in the name of D2 and

(c) for a declaration to be issued preventing D1 from disposing the lands until the Court ordered so.

The plaintiff also obtained various injunctions restraining D1 or D2 from selling on disposing of the land to a third party without the Court's consent.

On 5 August 1990 D2 applied to set aside the interlocutory injunctions contending that

(i) the 2 prohibitory orders of the plaintiff were not registered until 30 October 1990 and

(ii) that prior to the registration of the prohibitory orders there were 3 winding-up petitions presented to the Court to wind-up D1.

D2 argued that by reason of the presentation of the winding-up order, the plaintiff had no right to obtain and register the two prohibitory orders pursuant to the prohibition imposed by s. 224 read with s. 219(2) of the Act.

The plaintiff however contended that D2 took the ownership of the lands subject to all encumbrances as ordered by the Court, including the prohibiting orders of the plaintiff.

Held:

[1] The language used both in ss. 224 & 219 of the Act are clear and precise and mean that any attachment, sequestration, distress or execution put in force against property, be it movable or immovable, of a company after the presentation of a winding-up petition shall be void. The provisions in the sections above are mandatory not only because the word "shall" is used in both sections but also because, unlike s. 223 of the Act which provides *inter alia* that any disposition of the property of the company after the commencement of the winding up by a Court shall be void unless the Court orders, there is no such validating power given to the Court to validate the things done under s. 224 of the said Act.

[2] The prohibitory orders granted against D2 are executions of judgment of the Court relating to land and therefore fall within s. 224 of the Act.

[3] D1 cannot in the course of its carrying on trading and controlling the assets, act in contravention of s. 223 of the Act. Neither could the property of the company be subject to attachment, sequestration, distress or execution order pursuant to s. 224 of the said Act.

[4] There is nothing to indicate that ss. 224 and 298 of the Act must be read together. The purpose for enacting a statute can only be construed from the words used in the provision. Accordingly, the purpose of enacting s. 224 is to ensure that the assets of the company are not dissipated between the date of presentation of the winding-up order and the date of the passing of the winding-up order, to enrich one or more unsecured creditors at the expense of other unsecured creditors.

[5] The purpose of s. 224 is to preserve the assets of the company from the date of the presentation of a petition for winding-up the company; the purpose of s. 298 is to empower the liquidator to recover any dissipation of the assets of the company which had been wrongly acquired by a creditor through the evasion of the prohibition set out in s. 224.

[6] All dispositions of property and effects of a company made between the commencement of the winding-up order and the order for the winding-up shall be void unless the Court otherwise orders pursuant to s. 223 of the Act.

[7] Bearing in mind that the same words, that is, "after the commencement of the winding up" are used in both ss. 223 and 224 which is stated in s. 219 to mean the date of presentation of the petition for the winding up, it must follow that all attachment, sequestration, distress or execution put in force against the estate or effects of the company made within the interval of the presentation of the petition to wind-up the company and the date when the order for winding-up must be void.

[8] The prohibitory orders obtained by the plaintiff had the effect of not only restraining D1 from dealing with the scheduled lands but also gave the plaintiff the right to dispose the lands to satisfy the judgment sum due to it. The plaintiff therefore had no right under the law to take out the two prohibitory orders - they are null and void pursuant to s. 224 of the Act.

[9] Therefore the plaintiff had failed to establish that it had raised any triable issue that could only be resolved at the proper trial of the case. The institution of this action by the plaintiff was not only frivolous or vexatious but it was also an abuse of the process of the Court.

[10] Notwithstanding the above conclusion, the granting of the interlocutory injunction to the plaintiff on the balance of convenience would have been improper simply because the plaintiff could be fully compensated upon the sale of the 131 apartments of which D1 is still the owner.

[D2's application allowed with costs and the injunctions granted to the plaintiff dissolved.]

Cases referred to:
American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504 ***(foll)***
Associated Tractors Sdn. Bhd. v. Chan Boon Heng [1990] 2 MLJ 408 ***(foll)***
Ayerst (Inspector of Taxes) v. C & K (Contractors) Ltd. [1975] 2 All ER 537 ***(not foll)***
D. Wilson (Birmingham) Ltd. v. Metropolitan Property Developments & Anor. [1975] 2 All ER 814 ***(cit)***
E. Pitchard v. Westminster Bank Ltd. [1969] All ER 999 ***(foll)***
Fleet Motor & General Insurance Co. (Aust.) Pty. Ltd. v. Tickle [1984] 2 ACLC 282 ***(not foll)***
Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1987] 1 MLJ 56 HC ***(cons)*** *& [1988] 2 MLJ 449 SC* ***(foll)***
Miles Aircraft Ltd. [1948] 1 All ER 225 ***(not foll)***
Overseas Aviation Engineering (G.B.) Ltd. [1963] 1 Ch 24 ***(foll)***
Rainbow & Anor. v. Moorgate Properties Ltd. [1975] 2 All ER 821 ***(cit)***
Re Barrier Reef Finance and Land Pty. Ltd. [1988] 6 ACLC 827 ***(cons)***
Re Leitch Collieries Ltd. [1926] 1 DLR 1183 ***(foll)***
Thye Chwee Hoon v. Cayman Commodities (M) Sdn. Bhd. Anor. [1990] 2 MLJ 23 (cons)

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), 219, (2), 221, 223, 224, 298
Companies Act 1985 [UK], s. 523(i)
Insurance Act 1963, ss. 116(1), 62(8)
National Land Code 1965, ss. 336(1), 368(3), 365, 417, 420

For the plaintiff - P.S. Gill; M/s. Gill & Tang
For the defendant - Pakhruddin Sulaiman; M/s. Nik Saghir, Yaacob & Ismail

JUDGMENT

Lim Beng Choon J:

On 28 June 1990, the plaintiff, Pembinaan KSY Sdn. Bhd., filed this originating summons in which Lian Seng Properties Sdn. Bhd. were named as the 1st defendant and Noble Circle (M) Sdn. Bhd. were made the 2nd defendant. By this originating summons, the plaintiff asked for the following reliefs:

1. Satu deklarasi yang semua pemindahan semua tanah-tanah ini yang disenaraikan dalam jadual daripada defendan pertama kepada defendan kedua adalah bertentangan dengan s. 336 Kanun Tanah Negara diisytiharkan tak sah (null and void).

2. Yang pendaftar Geran Tanah Kuala Lumpur diarah untuk membatalkan pendaftaran, pengindorsan diatas nama defendan kedua, Noble Circle (M) Sdn. Bhd. daripada buku pendaftaran hakmilik dalam perkara berkaitan dengan tanah yang disenaraikan dalam jadual.

3. Dan seterusnya atas pengeluaran diklarasi, satu perintah untuk menghalang defendan pertama daripada menjual, menghapuskan, mencagarkan atau sebaliknya tanah berkenaan sehingga perintah selanjutnya dari mahkamah.

On the same date the plaintiff also made an application by way of an *ex parte* summons-in-chambers in which it requested firstly for an interlocutory injunction to restrain the 1st defendant from selling, charging, transferring the possession of some 131 apartments of Kuala Lumpur Plaza (K.L. Plaza) erected on the several parcels of land originally belonging to the 1st defendant and the said lands were referred to in the affidavit in support (encl. 2) as "the scheduled lands." For consistency I shall also in this judgment refer to the said lands as the scheduled lands. Secondly the plaintiff asked for an interlocutory injunction to restrain the 2nd defendant from selling, charging, disposing or transferring all or part of the scheduled lands and K.L. Plaza to a third party without consent of the Court. Finally the plaintiff asked for an injunction of like nature to restrain the 2nd defendant from transferring the 131 apartments to a third party and registering them under the name of the third party or charging the same to a third party without the consent of the Court.

In support of its originating summons one Peter Kua Tian Nam the managing director of the plaintiff affirmed an affidavit on 28 June 1990 (encl. 2). The crux of the case for the plaintiff as can be gleaned from this affidavit is as follows. The plaintiff was appointed by the 1st defendant to construct and complete the K.L. Plaza on the scheduled lands pursuant to a building contract dated 14 April 1983. In the course of construction the 1st defendant failed to pay the plaintiff progressive payment as certified by the consulting architect of the project. The progressive payment was in the sum of RM10,529,000. As a result the plaintiff instituted action in Kuala Lumpur High Court as Civil Suit No. 23-39-87 and obtained judgment in default on 31 March 1987 against the 1st defendant for the sum of RM10,529,000. In carrying out the project of constructing K.L. Plaza the 1st defendant had, upon charging the scheduled lands to a Consortium of Bankers, obtained a bridging loan of RM92 million. However as the 1st defendant failed to comply with the terms of the loan agreement the Consortium of Bankers refused to release the loan sum to the 1st defendant. Under the circumstances works on the said project was abandoned. Thereafter negotiations were carried out among the Consortium of Bankers, the plaintiff and the 1st defendant and the outcome of which two agreements were executed *viz* (i) agreement dated 22 April 1987 by which the plaintiff agreed to complete the said project provided *inter alia* that the 1st defendant would pay the plaintiff the cost of completing the said project which was in the sum of RM26,050,000 (inclusive of the

judgment sum of RM10,529,000 obtained by the 1st defendant) to be payable within 18 months from the date of completion of the said project and (ii) the Consortium of Bankers executed an agreement with the 1st defendant known as a Sharing Formula Agreement dated 29 April 1987 in which the parties arranged *inter alia* as to how payments were to be made to the plaintiff. As a result of these two agreements the plaintiff recommenced the construction of K.L. Plaza and completed it but apart from some small payments made to it, the 1st defendant ultimately failed to pay the sum of RM23,431,000. The plaintiff again instituted action under Kuala Lumpur Civil Suit 22-192-1988 to claim for that sum minus the judgment sum of RM10,529,000 which came to RM12,902,000. Again the plaintiff obtained final judgment in default against the 1st defendant on 17 November 1988 and the latter was ordered to pay the said sum of RM12,902,000 to the plaintiff. As there was no application to stay the execution of the two judgments the plaintiff obtained two prohibiting orders against the scheduled lands dated 26 October 1989 pursuant to s. 335 of the National Land Code 1965 (the NLC). The plaintiff regularly applied for the extension of the period of validity of the two prohibiting orders. On the same date the plaintiff also obtained two writs of seizure and sale of the scheduled lands. On 26 October 1989 the plaintiff presented a petition for the winding up against the 1st defendant.

In support of its application for the injunctive orders the plaintiff said unless the interlocutory injunctions were granted the 1st or 2nd defendant might probably sell, charge or dispose part of or the whole of the scheduled lands or K.L. Plaza to a third party thereby depriving the plaintiff of the fruits of the judgments obtained by them.

I granted the interlocutory injunction asked for by the plaintiff at an *ex parte* hearing on 9 July 1990.

On 5 September 1990 the 2nd defendant applied by way of summons-in-chambers to set aside the interlocutory injunctions insofar as they affected it. The application of the 2nd defendant was supported by an affidavit affirmed by one Teh Chor Tik, the Executive Chairman of the 2nd defendant affirmed on 5 September 1990. The summary of the 2nd defendant's contentions that can be adduced from the said affidavit are as follows.

By a sale and purchase agreement dated 5 June 1989 executed between the 1st and 2nd defendants the 1st defendant agreed to sell and the 2nd defendant agreed to purchase the sale assets of the 1st defendant as set out in the said agreement namely all the scheduled lands and part of K.L. Plaza comprising of:

(a) 5 storey Shopping Podium (approximately 234,006 square feet of lettable area)

(b) 6 units of 5 storey Shop houses Nos. C1 to C6 annexed to the shopping podium (approximately 39,600 square feet of lettable area)

(c) 10 storey office Tower Block atop the Shopping Podium (approximately 78,300 square feet of lettable area) and

(d) car parks of 59 bays at Level One, 231 bays at Level Two, 172 at Level Three and 27 Open Area.

The said 1989 agreement was varied by a supplementary agreement dated 19 March 1990 executed between the two parties whereby the parties agreed to vary the price and the procedure to complete the sale assets of the 1st defendant. Thereafter the 1st defendant applied to the Court to approve the sale of the 1st defendant sale assets as stated above on 5 April 1990. The Court gave its approval pursuant to s. 223 of the Companies Act 1965 for the sale as expressed in the supplementary agreement. Upon the application of the 1st

defendant made on 4 June 1990 the Court amended the earlier Order granting its consent by adding a paragraph stating that "the registration effected under s. 417 and/or 420 of the National Land Code under para. (d) above shall be without prejudice to and subject to the right, title and interest of the caveats, easement, tenancy, lease to any other encumbrances entered into the register. Following the Court orders of 5 April 1990 and 4 June 1990 the 2nd defendant duly paid to the 1st defendant the full purchase price to enable it to discharge all the charges made to the Consortium of Bankers and other chargees. The scheduled lands were duly registered in the name of the 2nd defendant by the Land Office Wilayah on 5 June 1990. It was also asserted that the two prohibitory orders of the plaintiff were not registered with the Land Office Wilayah until 30 October 1990. Quite apart from that prior to the registration of the two prohibitory orders there were three winding-up petitions presented to the Court to wind up the 1st defendant company. The winding-up petition was No. D2-28-514-89 presented by Syarikat Salehuddin Abdul Aziz Development & Mining Sdn. Bhd., a winding up petition dated 10 December 1987 presented by Morgan Guaranty Trust Company of New York and the Winding-up Petition No. D3-517-89 presented by the plaintiff itself. By reason of the presentation of the Winding-up Petitions the plaintiff had no right to obtain and register its two prohibitory orders pursuant to the prohibition imposed by s. 224 read with s. 219(2) of the Companies Act 1965. The remaining contentions of the 2nd defendant related to the question of balance of convenience which I shall deal with presently.

The plaintiff through its managing director affirmed a further affidavit on 7 December 1990 in which it alleged *inter alia* that the 2nd defendant took the ownership of scheduled lands subject to all encumbrances as ordered by the Court including the prohibiting orders of the plaintiff.

It is appropriate at this stage to examine the law relating to the grant of an interlocutory injunction. The principles on which an interlocutory injunction may be granted by a Court are now quite settled in view of Lord Diplock's speech in the leading case of *American Cyanamid Co. v Ethicon Ltd.* [1975] 1 All ER 504 at pp. 510-511. The principles that can be distilled from Lord Diplock's speech appear to be as follows. The grant of an interlocutory injunction is a remedy that is both temporary and discretionary and in exercising its discretion whether or not to grant an injunction, the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case. Where there is a serious question to be tried and the plaintiff's case is neither frivolous nor vexatious the Court must go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction sought. The governing principle is that if the recoverable damages would be an adequate remedy, no interlocutory injunction should normally be granted **however strong the plaintiff's claim appears to be** at the interlocutory stage.

Equally if the recoverable damages under the plaintiff's undertaking as to damages would be adequate remedy for the defendant and the plaintiff is in a financial position to pay them, then there is no reason to refuse the plaintiff an interlocutory injunction. Where other factors appear to be evenly balanced the prudent course for the Court is preserve the *status quo*. Not only is the approach adopted by Lord Diplock in the *Cyanamid* case approved by our Supreme Court, the latter Court in *Associated Tractors Sdn. Bhd. v. Chan Boon Heng* [1990] 1 MLJ 408 even went on to say:

> If these factors are evenly balanced it may not be improper for the Court to take into account any tipping of the balance as revealed by the affidavits. (*ibid* p. 409)

Reverting to the case, I noticed that both the Counsel for the plaintiff and Counsel for the 2nd defendant devoted a great part of their written submissions on matters that could only be resolved at the trial proper and not at this interlocutory stage. They are matters based on conflicting evidence which could only be resolved after detailed arguments and mature consideration of the difficult questions of law and fact at the trial. Both Counsel seemed to have overlooked the propositions laid down in the *American Cyanamid* (*supra*) case that the function of the Court at this interlocutory stage is to do nothing more than to find out whether the plaintiff has raised some triable issues and that his action is not frivolous or vexatious. It is only after the Court has carried out this first step that it may proceed to the second step to determine the question based on the doctrine of "balance of convenience".

In deciding whether the plaintiff here has raised one or more triable issues, it is necessary to bear in mind that the cause of action as can be culled from this originating summons of the plaintiff is that since it had obtained the two prohibitory orders pursuant to s. 335 of the NLC which were duly registered with the Registrar of Titles Wilayah on 30 October 1989, the subsequent transfer of the scheduled lands made on 5 June 1990 which was also duly registered by the Registrar of Titles Wilayah on the same date should be declared null and void by the Court as such transfer infringed s. 336(1) of the NLC which prohibits the registration, endorsement or entry in the register document of title any instrument of dealing executed by or on behalf of the proprietor of the relevant land (and in this case the scheduled lands). Based on this cause of action the plaintiff then went on to ask for the two interlocutory injunctions against the 2nd defendant as set out in this originating summons which I have reproduced in the first paragraph of this judgment.

On the other hand Counsel for the 2nd defendant in his written submission contended that:

(1) The plaintiff has **no reasonable cause of action** against the 2nd defendant based on the following three grounds:

   (a) when the prohibitory orders were entered on the said lands on 30 October 1989 there was no equity of the 1st defendant in the said lands against which the prohibitory orders can be registered. **The prohibitory orders therefore have no effect as the beneficial interest in the said lands have already passed to the 2nd defendant.**

   (b) 2nd defendant's title to the said Lands are indefeasible under s. 34 (*sic*) of the NLC.

   (c) the prohibitory orders relied upon by the plaintiff are void by virtue of s. 224 read together with s. 219(2) of the Companies Act 1965.

(2) Non disclosure of material facts by the plaintiff in obtaining the *ex parte* interim injunction.

(3) The balance of convenience in this case is in favour of the 2nd defendant.

As the sole cause of action of the plaintiff is based on the two prohibitory orders which it claimed to prohibit the transfer and registration of the scheduled lands to the 2nd defendant thereby rendering the said transactions null and void, I shall deal first with ground (1)(c) of the contentions of Counsel for the 2nd defendant namely that the prohibitory orders obtained by the plaintiff were void in that they infringed s. 224 read with s. 219(2) of the Companies Act 1965.

Now s. 224 of the Companies Act 1965 says:

> Any attachment, sequestration, distress or execution put in force against the estate of the company after the commencement of the winding up by the Court shall be void.

Commencement of the winding-up of a company is defined in subsection (2) of s. 219 of the said Act which reads:

> In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

Reading the two sections, I have absolutely no doubt that since the language used in the two sections is so clear and precise, they must mean what they say namely that any attachment, sequestration, distress or execution put in force against the property, be it movable or immovable, of the company after the presentation of a petition to wind up the company, shall be void. The provisions of the two sections are clearly mandatory not only because the word "shall" is used in both sections but also because, unlike s. 223 of the Companies Act 1965 which provides *inter alia* that any disposition of the property of the company after the commencement of the winding up by a Court shall be void **unless the Court orders**, there is no such validating power given to the Court to validate the things done under s. 224 of the said Act.

The next question to ask is whether the two prohibitory orders come within the key phrases of s. 224 of the Companies Act 1965 which are these:

> Any attachment, sequestration, distress or execution put in force against the estate and effects of the company.

On this point I agree with Counsel for the 2nd defendant that the said prohibitory orders are in the nature of an execution of judgment of the Court relating to land. In *Overseas Aviation Engineering (G.B.) Ltd.* [1963] 1 Ch. 24 (which case was drawn to my attention by Counsel for the 2nd defendant) Lord Denning observed that:

> execution means, quite simply, the process for enforcing or giving effect to the judgment of the Court.

In *Re Leitch Collieries Ltd.* [1926] 1 DLR 1183 McCarthy J said:

> To file an execution in the Land Titles Office in this Province is to put it in force against the land of the company in liquidation and under s. 23 is void.

It is to be noted that the s. 23 referred to in the speech of McCarthy J was a section in the Canadian Winding-up Act which is similar to s. 224 of our Companies Act 1965. From the authorities cited above I am therefore satisfied that the two prohibitory orders obtained and registered by the plaintiff fall within s. 224 of the Companies Act 1965.

Counsel for the 2nd defendant had also drawn my attention to two cases which dealt with the scope of s. 224. The first case is *Thye Chwee Hoon v. Cayman Commodities (M) Sdn. Bhd. Anor.* [1990] 2 MLJ 23. The brief facts of this case are these. On 18 November 1988 the plaintiff judgment creditor obtained final judgment against the 1st defendant for a sum of money specified in the statement of claim. The plaintiff thereafter proceeded to apply as judgment creditor for a garnishee order against the 2nd defendant as garnishee. The Senior Registrar of the Court granted a garnishee order to show cause on 22 November 1988. At the hearing of the application to show cause the Senior Assistant Registrar refused to make the garnishee order absolute and one of the grounds relied on by the Senior Assistant Registrar in refusing to make the garnishee order absolute was that as the 1st defendant was subject to a winding-up petition in the Penang High Court, by virtue of ss. 219(2) and 224 of the Companies Act 1965 the proposed attachment or execution was void. On appeal, the learned Judge in dismissing the appeal said at p. 24:

> First, s. 219(2) of the Companies Act 1965 clearly provides that in the case of a winding up by the Court, as opposed to voluntary winding up under sub-s(1), the winding-up date shall be deemed to have commenced from the presentation of the petition. Secondly, the fact of a winding-up order is to avoid all disposition of the property (including things in action) of the company made between the commencement of the winding up, that is, the presentation of the petition and the winding up order. Therefore, s. 224 clearly provides that any attachment or execution against the property of the company after the commencement of the winding up is void. Hence, in the present case, as the winding-up petition against the first defendant had commenced well before the garnishee proceeding was taken in November 1988 it is therefore void. Further, there is no basis for me to exercise my powers under s. 298(1)(c) Companies Act 1965.

The second case is *Re Barrier Reef Finance and Land Pty. Ltd.* [1988] 6 ACLC 827. In this case an application was made by A to wind Reef Finance and Land Pty. Ltd. (the company) upon the company's failure to comply with a demand for RM35,000 under s. 364 of the Companies (Queensland) Code. Shortly after filing the application for winding up, the judgment creditors of A obtained garnishee orders against the company for the aggregate of RM30,000. A argued that garnishee orders were of no effect by reason of s. 368(3) of the said Code which provided that any attachment put into force against the property of the company after the commencement of the winding up by the Court was void. Under s. 365 of the said Code winding up was deemed to have commenced at the time of the filing of the application for winding up. It is interesting to note that ss. 368(3) and 365 of the said Code are in *pari materia* with ss. 224 and 219(1) respectively of our Companies Act 1965. In holding that garnishee orders could not be properly taken against an insolvent company after the commencement of winding up proceedings two passages from the speech of Connolly J may be reproduced to show the rationale of the decision of the learned Judge. The first passage appearing at p. 830 of the judgment of the reported case said:

> From the commencement of the winding up of the company in this case it was "no longer really the owner of its own property". That property is held as trustee for the whole of its creditors for equal division and it is wholly inconsistent with this notion that creditors of the applicant should be able to obtain by way of execution the whole of the debt due to him.

The second passage also appears in the same page where it was said:

> It is obvious, in my judgment, that garnishee proceedings cannot be taken against an insolvent company the winding up of which was commenced and, for present purposes, this company must be regarded as insolvent. It follows that none of the garnishee orders was valid and that any payments made by the company cannot be regarded as payments made in garnishee proceedings. For what it is worth, *Tile Centre* is authority for the proposition that they may be reversed by the Courts which made them and that moneys paid may be recovered. The garnishors, however, could not give a good discharge and it follows that the whole sum of RM35,000 remains owing by the company to the applicant.

These two authorities therefore support contention 1(c) raised by Counsel for the 2nd defendant.

Counsel for the plaintiff on the other hand submitted that the mere filing of a winding up petition in Court could not trigger off the commencement of winding up by the Court. There must be an 'order' made for the winding up by the Court before it can be stated that there is in reality a winding up of the company. Only after an 'order' is made by the Court does s. 219 of the Companies Act make the Order retrospective to the date of presentation of the petition. At the hearing of the winding up petition under s. 221 of the said Act the Court had power to dismiss the petition or to make any interim order directing the winding up of

the company. Counsel then cited the case of *Fleet Motor & General Insurance Co. (Aust.) Pty. Ltd. v. Tickle* [1984] 2 ACLC 282 where it was held that:

> A compulsory winding up does not in fact commence until the winding up order is made by the Court. Once the order is made the winding up is to be deemed to have commenced at the earlier date.

He also cited a couple of English cases *viz Miles Aircraft Ltd.* [1948] 1 All ER 225 and *Ayerst (Inspector of Taxes) v. C & K (Contractors) Ltd.* [1975] 2 All ER 537. I shall deal with these cases presently.

The second point made by Counsel was that what the Court must distinguish is between the right of the company to carry on trading and to control its assets between the date of presentation of the petition and the date of the making of the winding up order (if any) as against the right of the liquidator appointed after the winding up order is made to challenge and declare as void the disposition and execution against the company.

The final point raised by Counsel was that s. 224 of the Companies Act 1965 must be read in conjunction with s. 298 of the said Act in that if and only if a winding up order is made, would s. 224 make such executions void and s. 298 was an amplification of the same which prohibited a creditor from retaining the benefit of the execution or attachment before the date of the commencement of the winding up subject to the proviso under subsection (1)(c) of s. 298 of the Companies Act 1965 which provides that the rights conferred by the subsection on the liquidator could be set aside by the Court in favour of the creditor to such an extent and subject to such terms as the Court thinks fit. The discretion of the Court is unfettered. Counsel also raised a few more propositions on this issue which involved conflicting evidence and as such they could only be considered at the trial proper of this action.

As to the first point raised by Counsel for the plaintiff, I cannot agree with him simply because as I have said earlier the language used in both ss. 219 and 224 of the Companies Act 1965 are so clear that there is no room to accommodate the propositions suggested by the Counsel. It may be recalled that Counsel cited the *Fleet Motor and General Insurance Co.* case to support his contentions. Let us examine that case in greater depth. The facts of that case briefly stated are as follows. *Fleet Motor and General Insurance Co. (Aust) Pty. Ltd.* (the company) had authority to carry on insurance business under the Insurance Act. Proceedings were commenced by the company for an order that it be wound up and a provisional liquidator was appointed by the Court. No winding up order had then been made in the proceedings. The Insurance Commissioner asserted that the company was precluded from carrying on insurance business by virtue of the operation of s. 116(1) of the Insurance Act. The provisional liquidator believed that it might be possible for the company's shares to be sold and the proceeds made available for distribution provided the company was not precluded from carrying on insurance business. Accordingly the company commenced proceedings against the Insurance Commissioner seeking declaratory relief. The critical question posed before the Court was whether within the meaning of ss. 116(1) and 62(8) of the Insurance Act the company had been "commenced to be wound up" upon proceedings for winding up being instituted. Section 116(1) were in the following terms:

> Where a body corporate authorised under this Act to carry on insurance business is commenced to be wound up the body corporate shall not, after the date of the commencement of the winding up carry on insurance business.

It was submitted by the Counsel for the defendant that the use of the expression "is commenced to be wound up" indicated that the legislature intended that these words should have the technical meaning which it was said they had under the company law in the case of winding up by the Court, namely that the winding-up was to be "deemed to have commenced at the time of the application for the winding-up." It was therefore argued that for this reason the prohibition in s. 116(1) of the Insurance Act came into operation at the time of the commencement of the winding up proceedings. In rejecting the submission of the defence Counsel and allowing the declaratory relief sought by the plaintiff McLelland J said at p. 285 of the reported case:

> A compulsory winding up does not in fact commence until the winding up order is made by the Court. Once the order is made, the winding up is to be "deemed to have commenced" at the earlier date. In this context the word "deemed" is used to create a statutory fiction and in such a case, "it becomes very important to consider the purpose for which the statutory function is introduced" (see per Griffith CJ in *Muller v. Dalgery & Co. Ltd. & Anor.* [1909] 9 CLR 693 at p. 696). I do not see any sufficient basis for supposing that the purpose for which this statutory fiction was introduced extends beyond the purposes of (now) the Companies Act 1981 itself and the equivalent State Codes, in particular I do not consider that this statutory fiction should be introduced into the Insurance Act so as to produce a fictional fact in circumstances where the true fact on which the deeming provision is to operate in the legislation in which it occurs (*viz.* the making of a winding up order) does not exist.

The *ratio decidendi* of that case is that the deeming provisions of the company law which creates a statutory fiction should be confined to Companies Act and should not be allowed to be imported into the Insurance Act particularly when the latter Act did not have such a deeming provision. The observation of the learned judged about when a winding up commenced is mere *obiter.* More importantly the *obiter dictum* of the trial Judge in the *Fleet Motor* case is diametrically incompatible with the principles enunciated in the later case of the *Barrier Reef Finance* (*supra*) and the case of *Galbraith v. Grimshaw* cited by the trial Judge in the *Barrier* case. The *Fleet Motor* case is therefore of no assistance to the plaintiff.

As regards to the two English cases cited by Counsel to support his contentions, it is important to note that the English statutory provisions relating to the prohibition against subjecting the property of company to attachment, sequestration, distress or execution order are worded differently. This can be seen from the language used in s. 523(i) of the English Companies Act 1985 which is the counterpart of s. 224 of our Companies Act 1965. The wordings of s. 523(i) have been reproduced in Halsbury's Statutes 4th Edn. Vol. 8 at p. 529 and they are as follows:

> Where a company registered in England and Wales **is being wound up by the Court**, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void. (Emphasis is mine).

I agree with Counsel for the 2nd defendant that it is clear even upon a cursory reading of the English s. 523(i) that it is not in *pari materia* with our s. 224. Under the English provisions, it is clearly spelt out that any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up **is void where the company is being wound up by the Court**. It is significant to note that the phrase "Where a company registered in England and Wales is being wound up by the Court" is omitted in our s. 224. The decisions of the English cases being based on the interpretation of their s. 523(i), are not appropriate in construing the scope of our s. 224.

Turning to the second point raised by the defence Counsel, no one can dispute that prior to the appointment of a liquidator or the making of a winding up order the company concerned has the right to carry on trading and to control its assets between the date of presentation of a winding up petition and the date of the making of a winding up order. However the said company cannot in the course of its carrying on trading and controlling the assets, act in contravention of s. 223 of the Companies Act 1965. Neither could the property of the company be subject to attachment, sequestration, distress or execution order pursuant to s. 224 of the said Act.

As to the final point raised by Counsel *viz* the need to consider the effect of reading s. 224 in conjunction with s. 298 of the Companies Act 1965, I cannot agree with such proposition. Apart from the fact that there is absolutely nothing stated in the two sections that they must be read in conjunction with each other it is futile to construe s. 224 as dependent on or subject to s. 298 for in doing so it will not only render s. 224 redundant but it will also obliterate the purpose of which s. 224 was enacted. One of the principles of construction of a statute is that in enacting a provision in a statute the legislator intended the provision to serve a purpose and the purpose can only be construed from the words used in that provision. Thus in its 11th Edn. it is stated at p. 4:

> When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absolute sententia expositore non indiget*. Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The rule of construction is "to intend the legislature to have meant what they have actually expressed." It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just and expedient. The words cannot be construed, contrary to their meaning, as embracing or excluding cases merely because there is no good reason why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.

Applying the aforementioned principles to this case, it is absolutely clear to me that the purpose of enacting s. 224 is to ensure that between the date of the presentation of a winding up petition and the date of the passing of the winding up order the property of the company should not be dissipated to enrich one or more unsecured creditors at the expense of other unsecured creditors. Thus in *E. Pitchard v. Westminster Bank Ltd*. [1969] All ER 999 it was held:

> The overriding rule was that all creditors should be treated equally, accordingly the garnishee order which had the effect of giving the plaintiff preference over all other creditors ought not to have been made.

This finding was partly due to the following passage of Lord Denning's speech at p. 1001 where he said:

> The Court will not allow one creditor however diligent he may be to get an advantage over the others by getting in first with a garnishee order.

The approach adopted in the *E. Pitchard* case was followed in at least two other English cases namely *D. Wilson (Birmingham) Ltd. v. Metropolitan Property Developments & Anor.* [1975] 2 All ER 814 and *Rainbow & Anor. v. Moorgate Properties Ltd.* [1975] 2 All ER 821.

On the other hand s. 298 deals with a situation when a company has been wound up and it was subsequently discovered that a creditor has managed to evade the prohibition stated in s. 224 and issue execution against the goods or land of a company or has attached any debt due to the company. Under such circumstances that creditor shall not be allowed to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up. It is therefore clear that s. 224 and s. 298 deal with completely different situations. While the purpose of s. 224 is to **preserve** the assets of the company from the date of the presentation of a petition for winding up of the company, the purpose of s. 298 is to empower the liquidator to **recover** any dissipation of the assets of the company which had been wrongly acquired by a creditor through an evasion of the prohibition set out in s. 224. A useful case to illustrate the definition of commencement of the winding up appearing in s. 223 of the Companies Act is the case of *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors*. [1987] 1 MLJ 56. In this case there were several issues raised before the trial Court but I need only refer to the issue relating to whether the transfers of certain properties by the plaintiff to the defendant after the presentation of a winding up order but before the winding up order was made were void pursuant to s. 223 of the Companies Act 1965. The facts of the case relevant to this issue can be briefly stated as follows. The plaintiff owned some lands which the trial Judge, Yusoff Mohamad J (as he then was) for convenience described them as the first portion, comprising of 503 acres of lands held under State leases numbered 2198 to 2241 Lots 3320 to 3420, the second portion comprising of 87 acres of land held under C.T. 14799 to 14815 Lots 3302 to 3318 and the third portion comprising of 303 acres held under Grant 21955 Lot 2679. On 13 November 1978 the Government of Malaysia presented a petition to the High Court of Malaya at Johore Bahru for the winding up of the plaintiff company under s. 218(1)(e) of the Companies Act 1965 on the ground that it was unable to pay its judgment debt due to the government. On 21 November 1978 the plaintiff transferred the first portion of its lands to the defendant and the transfer was duly registered by the Land Office on the same date. On 30 November 1978 one Paramjothy, whom the learned Judge found as holding the said lands as bare trustee of the plaintiff, also transferred the second portion of the lands to the defendant which transfer was duly registered on the same date. Again on 30 November 1978 one P.F. Wong, whom the learned Judge also found to be holding the said lands as bare trustee of the plaintiff, transferred the third portion of the lands to the defendant which likewise was duly registered on the same date. The winding up order was made only on 11 March 1979. The learned Judge held that as the transfers and registrations were made after the commencement of the winding up that is to say after presentation of the petition to wind up the plaintiff company they were void pursuant to s. 223 of the Companies Act 1965. The learned Judge, however, exercised the discretion provided in s. 223 to grant a validation order to validate the transfers and registrations of the three portions of the lands on the ground that the 1st defendant acted *bona fide* as it had no knowledge of the presentation of the winding up order by the government.

The matter went on appeal to the Supreme Court - see *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 449. In upholding the decision of the learned trial Judge where he found that the transfers of the three portions of lands were void pursuant to s. 223 of the Companies Act 1965, Seah SCJ said at p. 455:

> The learned Judge held (correctly in my view) that the transfers of the first, second and third portions of the estate to the first respondent were void by reason of s. 223 of the Companies Act 1965 but he, however, in the exercise of his discretion, validated them. Learned Counsel for the second appellant had submitted that the learned Judge was wrong to validate

these said transfers and that he had exercised his discretion on wrong principles. For the first respondent, learned Counsel now concedes that these three dispositions were **made at the time of registration at the Land Registry office and since all three of them were registered under the presentation of the winding up petition by the Court on 13 November 1978 they were therefore void under s. 223 of the Companies Act 1965.** (Emphasis is mine)

Seah SCJ went on to hold that in the circumstances of the case the learned trial Judge had wrongly exercised the discretionary power under the said s. 223 to validate the transfers. The decision of the Supreme Court in the *Lian Keow* case fortifies the proposition that all dispositions of the property and effects of a company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up shall be void unless the Court otherwise orders pursuant to s. 223. Bearing in mind that the same words that is, "after the commencement of the winding up" are used in both ss. 223 and 224 which is stated in s. 219 to mean the date of presentation of the petition for the winding up, it must follow that all attachment, sequestration, distress or execution put in force against the estate or effects of the company made within the interval of the presentation of the petition to wind up the company and the date when the order for winding up must be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of the company. The prohibitory orders obtained by the plaintiff had the effect of not only restraining the 1st defendant from dealing with the scheduled lands but also gave the plaintiff the right to the disposal of the lands to satisfy the judgment sum due to it. This the plaintiff could not do in view of the earlier presentation of the petitioners for winding up of which one of the petitions was filed by the plaintiff itself. For these reasons I am satisfied that the plaintiff has no right under the law to take out the two prohibitory orders - they are null and void pursuant to s. 224. On this ground alone the plaintiff has failed to establish that it has raised any triable issue that could only be resolved at the proper trial of the case. The institution of this action by the plaintiff is not only frivolous and vexatious it is also an abuse of the process of the Court.

Even if the action of the plaintiff could be sustained (to which I cannot accede) the granting of the interlocutory injunction to it is on the balance of convenience improper simply because the plaintiff could be fully compensated upon the sale of the 131 apartments of which the 1st defendant is still the owner. I have been given to understand by Counsel for the 1st defendant and Counsel for the plaintiff that an order had been obtained from the Commercial Division of the High Court to sell the said apartments at a price which would be very much more than sufficient to satisfy the judgment sums of the plaintiff.

For the reasons as stated above I allow the application of the 2nd defendant and revoke the interlocutory injunction granted *ex parte* to the plaintiff insofar as it restrains the 2nd defendant from selling, charging, etc. the scheduled lands. The interlocutory injunction granted to the plaintiff restraining the 1st defendant from selling and transferring the possession of 131 apartments is no longer necessary as the 1st defendant and the plaintiff had by consent obtained an order of Court to sell them at a fixed price. As to the third interlocutory injunction restraining the 2nd defendant from selling, charging etc. of the 131 apartments too is redundant as the 2nd defendant has no legal or equitable right to dispose the 131 apartments. The plaintiff must pay the costs of this proceeding to the 2nd defendant.

Also found at [1991] 3 CLJ 1836